UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, et al., Plaintiffs, vs. Tyson Foods, Inc., et al., Defendants.	**Civil No. 05-CV-0329 GFK-PJC** **THE CARGILL DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PROTECTIVE ORDER REGARDING THE CARGILL DEFENDANTS' MARCH 13, 2009 30(B)(6) DEPOSITION NOTICE**

Cargill Inc. and Cargill Turkey Production, LLC ("CTP") (together, "the Cargill Defendants") urge the Court to deny Plaintiffs' motion for protective order (Dkt. No. 1933), and to order the State to submit to the carefully limited 30(b)(6) deposition noticed on March 13, 2009. Plaintiffs' arguments that the notice is duplicative are not well founded, and they have made no showing of actual burden or other prejudice to support entry of a protective order, offering only groundless assertions of "harassment" and inconvenience.

Contrary to Plaintiffs' assertion, the Cargill Defendants' 30(b)(6) deposition notice does not require the State to "marshal all of its factual proof." (Dkt. No. 1933 at 7, quoting In re Indep. Serv. Orgs. Antitrust Litig., 168 F.R.D. 651 (D. Kan. 1996)). In reality, the Cargill-Defendant-specific information sought by the deposition notice constitutes a very small portion of Plaintiffs' case. As Plaintiffs have made clear throughout this litigation, they have generated the vast majority of their evidence on an "industrywide" basis, without addressing the conduct or characteristics of individual Defendants like Cargill or CTP. Most prominently, Plaintiffs have designated over two dozen testifying experts, only one of whom (David Payne) offers separate opinions relating to individual defendants.

The Cargill Defendants believe that Plaintiffs' "industrywide" approach is neither legally defensible or factually sufficient to sustain their claim, and believe that Plaintiffs instead must prove—as they have pled—individual claims against individual Defendants. That is, of course, a question for another day. Nevertheless, given the "industrywide" approach that Plaintiffs have taken, the Cargill-specific information that Plaintiffs will need to "marshal" to prepare its 30(b)(6) witness(es) will be minimal in volume, and Plaintiffs have offered the Court no specifics to suggest otherwise. That information is critical to the Cargill Defendants' defense of the case, and the Court should deny Plaintiffs' motion and permit the Cargill Defendants to take the noticed deposition.

RELEVANT DISCOVERY ORDERS

In August 2007, the Cargill Defendants served Plaintiffs with a set of five Rule 30(b)(6) deposition notices seeking witnesses to testify about both Cargill-specific and broader defense information. (Dkt. Nos. 1270-2; Dkt. Nos. 1933-2.) On Plaintiffs' refusal to provide deposition dates, the Cargill Defendants filed a motion to compel in September (Dkt. No. 1270), and Plaintiffs filed a cross-motion for protective order in October 2007 (Dkt. Nos. 1308-09). Plaintiffs principally argued that the notices were "inefficient," "time-consuming," "plainly oppressive, unduly burdensome and expensive" because they were issued by the Cargill Defendants as opposed to all Defendants jointly. (Dkt. Nos. 1308 at 1, 1309 at 2.) Plaintiffs nonetheless "recognize[d] that each Defendant should have an opportunity to question the State's Rule 30(b)(6) designees regarding relevant, non-privileged issues in the case." (Dkt. No. 1308 at 5.)

Earlier, Plaintiffs had filed a motion to compel "fully knowledgeable" 30(b)(6) designees for the Cargill Defendants (Dkt. No. 1244) and for Peterson Farms (Dkt. No. 1250), and these

Defendants filed respective cross-motions for protective orders (Dkt. Nos. 1257, 1264). The Court issued an Order ruling on these cross motions during the briefing period on the Cargill Defendants' motion to compel the State to provide Rule 30(b)(6) designees. (Oct. 24, 2007 Ord. at 5-6: Dkt. No. 1336.) The October 24, 2007 Order included rulings governing all Rule 30(b)(6) witnesses in this case (id. at 6-7), and ruled that "Plaintiff's motion as to the Cargill Defendants precedes the actual deposition and is therefore not technically ripe for determination." (Id. at 6, n.10.)

The Cargill Defendants' September 2007 motion to compel 30(b)(6) depositions of the State was first scheduled for hearing before Magistrate Judge Joyner on November 6, 2007. At the hearing, the Cargill Defendants requested that the Court hold the motions in abeyance because the parties were actively working on a compromise solution. (Nov. 14, 2007 Ord. at 3: Dkt. No. 1375.) The State's counsel conceded that Plaintiffs "recognize that the defendants are doing this [attempting to coordinate] without prejudice to an individual 30(b)(6) notice by some other defendant and we're doing this without any prejudice to any objection we might have to such an additional 30(b)(6), but that's a bridge we will cross when we get to it." (Dkt. No. 1933-3 at 100: Ex. 2 to Pls.' Mot. Prot. Ord.) In a page of the transcript that Plaintiffs did not attach to their motion for protective order, counsel for Plaintiffs clarified that the agreement was only to meet and confer. (Ex. A: Nov. 7, 2007 Hrg. Tr. at 101:2-8: "Mr. Nance: …. [W]e're going to meet and confer subject to the agreement that we've announced here. The Court: All right. So, the parties are going to meet and confer.").

Counsel for the Cargill Defendants emphasized that "one of the primary concerns" was that the Cargill Defendants "want Cargill specific questions." (Id. & Dkt. No. 1933-3 at 96.) Counsel stated that the Cargill Defendants were "not … waiving the right [to] seek company

specific information," and that "the defendants as a whole are not representing this as the end-all, be-all list for everyone …." (Id. & Dkt. No. 1933-3 at 98.)

By Order of November 14, 2007, the Court directed the parties to file a status report by the end of the month advising it of the parties' progress in reaching an agreement, and setting the matter for hearing on December 6, 2007 should any issues remain unresolved. (Nov. 14, 2007 Ord. at 3.) The same day, Plaintiffs filed their motion for preliminary injunction seeking to ban all land application of poultry litter in the IRW and demanding expedited consideration of the same. (Dkt. No. 1373, filed Nov. 14, 2008.)

The pending Rule 30(b)(6) negotiations promptly fell to the bottom of all the parties' priority lists. Thus, at the December 6, 2007 hearing, the parties asked that the motions regarding the 30(b)(6) depositions of the State remain in abeyance. The Court directed the parties to either withdraw their motions or issue a status report by January 11, 2008. (Dec. 7, 2007 Ord. at 2: Dkt. No. 1409.) The parties filed status reports asking to postpone the issue until after the preliminary injunction hearing. (Dkt. Nos. 1452-53.) The Cargill Defendants' report makes clear that the parties had failed to reach agreement on the scope of the 30(b)(6) deposition of the State. (Dkt. Nos. 1453 at 1-3; see also Nov. 7, 2007 Hrg. Tr. at 100: Dkt. No. 1933-3.)

The Court struck the pending cross-motions, ordering the parties to refile if necessary "following hearing on preliminary injunction." (Jan. 16, 2008 Min. Ord.: Dkt. No. 1462.) In sum, due to the intervening and all-encompassing preliminary injunction proceeding, the back-and-forth 30(b)(6) compromise protocol described on the record at the November 7, 2008 hearing never resulted in an agreement among the parties.

After the preliminary injunction proceeding, the focus of each of the Defendant's discovery efforts centered on Plaintiffs' experts' case, as the State had made clear that, despite

pleading its action as individual claims against individual defendants, the State intended to try this matter primarily as an expert case against "the poultry industry." Two individual Defendants determined that they wished to take Rule 30(b)(6) depositions of the State focused on expert issues. In April 2008, Cobb-Vantress noticed the 30(b)(6) deposition of the State on certain areas of inquiry (Dkt. No. 1933-5), and in July 2008, Peterson Farms noticed a 30(b)(6) deposition of the State on different topics (Dkt. No. 1933-6). The Cargill Defendants' attorneys did attend these depositions of the State's designees, but as they were not the noticing party, they did not lead the depositions, and they asked only limited questions. The Cargill Defendants did not at that time exercise their right to issue 30(b)(6) notices for Cargill-specific information, opting instead to pursue other discovery avenues first.

Plaintiffs' Second Amended Complaint alleges that the Cargill Defendants engaged in certain conduct that caused damages under CERCLA, RCRA, common law, nuisance, trespass, and other theories. In addition, Plaintiffs seek punitive damages. Plaintiffs have not asserted any "collective" or "aggregate" legal theory that would permit them to impute the conduct of another Defendant, or of all Defendants collectively, to the Cargill Defendants. Under the case as Plaintiffs themselves have pled it, their claims against the Cargill Defendants must rely on some evidence of some kind that ties Plaintiffs' claimed damages to Cargill's or CTP's specific conduct. For instance, neither Cargill nor CTP may be held liable for punitive damages for the conduct of parties over whom the companies have no control (nor of course can any other Defendant be held liable for the actions of others). Plaintiffs inappropriately try to lump all Defendants they have sued together into a single unit and to ignore the substantial differences between them, particularly with respect to discovery.

Contrary to Plaintiffs' assertion (offered without explanation or citation), the Cargill

Defendants are not pursuing "a joint defense of this action." (Dkt. No. 1933 at 4, n.2.) In fact, each Defendant is differently situated in a number of material respects, and each Defendant is pursuing a different set of factual and legal defenses to Plaintiffs' claims.[1] While the Cargill Defendants have often coordinated with the other Defendants for the sake of efficiency and the Court's and the parties' convenience, there is no singular "joint defense" of this case. Each Defendant stands on its own, and Plaintiffs are required to pursue their claims against each Defendant individually.

As explained fully in the Motion to Compel filed today (Dkt. No. 1941) and as discussed above, each of the Cargill Defendants has been pursuing entity-specific discovery from the State since the inception of this suit. Plaintiffs have attempted to thwart or delay those efforts by refusing to respond completely and non-evasively to written discovery in the first instance, and then by refusing to supplement their responses despite promises to do so. (See generally, id.) This behavior has necessitated numerous discovery motions against the State throughout this litigation, and has forced the Cargill Defendants to seek the Court's intervention now to compel Plaintiffs to both fully answer a set of February 2009 Cargill-specific discovery requests and to adequately supplement certain prior responses with Cargill-specific information.

Simultaneously with this last push on Plaintiffs to comply with their obligations under the Rules for written discovery, the Cargill Defendants served the State with a 30(b)(6) notice seeking only Cargill-specific testimony. Because their efforts to get Plaintiffs to identify this

---

[1] The fact that the Cargill Defendants have entered into a joint defense agreement and asserted a related privilege with respect to certain communications does not alter this fact. The joint defense privilege simply allows Defendants to protect communications on matters of common interest while still maintaining separate privileges and protections in their pursuit of their respective unique defenses.

evidence through written discovery having thus far produced only meager results, the Cargill Defendants turned to the alternative means of a 30(b)(6) deposition notice to pursue this individualized discovery. In response, Plaintiffs seek now to prevent any such deposition.

ARGUMENT

The Cargill Defendants are entitled to take a Rule 30(b)(6) deposition of the State to probe what (if any) factual basis Plaintiffs have for their individual claims against Cargill, Inc. and CTP, as opposed to the "industrywide" evidence that comprises virtually all of the information responses that Plaintiffs have provided to date. Courts agree that "[d]ue to the broad scope of discovery, it is exceedingly difficult to demonstrate an appropriate basis for an order barring the taking of a deposition." Horsewood v. Kids "R" Us, 1998 U.S. Dist. LEXIS 13108, at *15 (D. Kan. Aug. 13, 1998) (quoting in part Naftchi v. N.Y. Univ. Med. Ctr., 172 F.R.D. 130, 132 (S.D.N.Y. 1997)); see also U.S. Fire Ins. Co. v. Bunge N. Am., Inc., 2008 U.S. Dist. LEXIS 28348, at *22 (D. Kan. Apr. 7, 2008) ("a strong showing is required before a party will be denied the right to take a deposition.") The District of Kansas characterizes an order preventing a deposition as "a drastic action." Horsewood, 1998 U.S. Dist. LEXIS 13108, at *15 (quoting Deines v. Vermeer Mfg. Co., 133 F.R.D. 46, 48 n.3 (D. Kan. 1990)). Accordingly, courts normally deny motions to thwart depositions. E.g., Harris v. Euronet Worldwide, Inc., 2007 U.S. Dist. LEXIS 39247, at *4 (D. Kan. May 29, 2007) (citations omitted); Miles v. Wal-Mart Stores, Inc., 2007 U.S. Dist. LEXIS 51734, at *4 (W.D. Ark. July 17, 2007) (citations omitted).

Plaintiffs' motion hinges on their assertion that the Cargill Defendants' notice seeks testimony "unreasonably cumulative and duplicative of prior discovery." (E.g., Dkt. No. 1933 at 7.) Although Plaintiffs argue that the entirety of the Cargill Defendants' "notice is nothing but an improper effort to harass the State with duplicative, burdensome discovery" (Dkt. No. 1933 at

8), Plaintiffs offer no argument whatsoever in support of their claims as to 15 of the noticed Topics: 5, 6, 7, 12, 13, 14, 19, 20, 21, 27, 28, 29, 35, 36, and 37. (See Dkt. No. 1933-14.) As discussed below, Plaintiffs simply cannot meet their burden to show that a protective order is warranted without offering *any* arguments in support of nearly half of their substantive request.

Indeed, even in the case on which Plaintiffs primarily rely for their contentions that 1) the Cargill-specific 30(b)(6) deposition should be barred, and 2) if it proceeds it should be limited to no more than seven hours regardless the number of designees, the court actually **allowed** the challenged 30(b)(6) deposition with limitations. (Dkt. No. 1933 at 7 & n.3, discussing E.E.O.C v. Vail Corp., 2008 WL 5104811, at *2-3 (D. Colo. Dec. 3, 2008).) The Vail Corp. court refused to grant the relief that Plaintiffs seek here – the drastic remedy of preventing a deposition – despite making clear its frustration with the noticing party for a host of discovery issues and finding that most of the noticed topics were directly duplicative of testimony of corporate employees with direct knowledge. 2008 WL 5104811, at *2-3.

Although Plaintiffs argue for the extreme measure of a protective order preventing a deposition largely on the ground that the Cargill Defendants could or should have obtained entity-specific discovery through other means, "[a] party generally may choose the order and manner of discovery." Horsewood, 1998 U.S. Dist. LEXIS 13108, at *23. Thus, the District of Kansas rejected the defendants' request to bar a 30(b)(6) deposition in lieu of interrogatories or deposition upon written questions in Horsewood. Id. The Cargill Defendants are entitled to conduct reasonable discovery at the time and in the manner they deem fit.

A. The Cargill-Specific 30(b)(6) Notices Are Not Duplicative of Cobb-Vantress and Peterson Farms' 30(b)(6) Notices on General Topics.

Although Plaintiffs seek to bar any 30(b)(6) deposition of the Cargill Defendants, their motion and supporting chart at Exhibit 11 identify only a few discrete topic areas that even

arguably overlap. First, Plaintiffs do not contend that any topic on the Cargill Defendants' notice overlaps topics on Cobb-Vantress' 30(b)(6) notice served April 28, 2008. Instead, Plaintiffs' arguments focus *exclusively* on Peterson Farms' 30(b)(6) notice served on the State on July 1, 2008. (See Dkt. Nos. 1933 at 3-4 & Chart at 1933-14.) Second, Plaintiffs do not contend that the Cargill Defendants' Topics 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 23, 24, 26, 27, 28, 29, 30, 32, 34, 35, 36, or 37 overlap in any way with the prior 30(b)(6) depositions of the State. (See Dkt. No. 1933-14.) In fact, Plaintiffs provide arguments in support of their protective order as to only six topics supposedly duplicative of earlier 30(b)(6) depositions. After further review and consideration, the Cargill Defendants are willing to withdraw Topics 22 and 31. As to the remaining four topics, the Cargill Defendants offer the following specific responses:

Topic 15 seeks binding testimony about the "specific acts or omissions of Cargill Defendants or their contract growers" that the State alleges violated federal or Oklahoma laws, rules, or regulations. (Dkt. No. 1933-4 at 6.) Plaintiffs contend this topic is duplicative of Peterson Farms' noticed Poultry Growing Operations and Management of Poultry Litter topics 3 and 9, which respectively sought general information about complaints and violations of Oklahoma statutes and regulations regarding "any poultry feeding operation" and "any poultry integrator" within the IRW. (Dkt. No. 1933-6 at 9, 10.) These precursor topics are not duplicative or cumulative of the Cargill Defendants' March 2009 noticed Topic 15. First, neither of the earlier notice topics involved allegations of federal violations. Second, the Cargill Defendants seek information about the "specific acts or omissions of Cargill Defendants or their contract growers" alleged by the State, not an overview of the State's general information about regulatory violations. Plaintiffs' 30(b)(6) designee for this subject specifically refused to state

whether or not the State knew of any Cargill-specific violations. (Ex. B: Gunter Dep. Vol. III at 179:13–182:4.) This Court should allow this narrow 30(b)(6) questioning.

Topic 16 seeks 30(b)(6) testimony about the specific acts or omissions of the Cargill Defendants or their contract growers that the State alleges caused pollution of the air, land, or waters of Oklahoma. (Dkt. No. 1933-4 at 6.) Plaintiffs allege that Topic 16 duplicates topics 4, 5, 6, and 8 of the same Peterson Farms category, which sought general information about complaints that poultry waste has discharged to the waters of the State and that IRW waters have been contaminated by poultry waste, and information about "ecological or environmental impacts" resulting from such complaints or from violations of state law. (Dkt. No. 1933-6 at 9.) The Cargill Defendants are entitled to test the State's allegations about the "specific acts or omissions of Cargill Defendants or their contract growers" that Plaintiffs contend caused or cause pollution, which is different from state agency complaints or about overarching "ecological or environmental impacts." Thus, the Court should permit this tailored topic.

Topic 25 seeks 30(b)(6) testimony regarding "each instance of runoff or releases" of alleged pollutants or contaminants known or alleged by the State to have occurred from property owned, managed, or controlled by the Cargill Defendants or their contract growers. (Dkt. No. 1933-4 at 6.) The State seeks to avoid Topic 25 on the ground that it is cumulative of the Peterson topic seeking general information about complaints that poultry waste "has been discharged" to the waters of the State within the IRW. (Dkt. No. 1933-6 at 9.) The Cargill Defendants need to pin the State down on its pleaded allegations that the Cargill Defendants are liable for specific "instances" of runoff or releases. As Plaintiffs have refused to fully answer written discovery on this subject (see Dkt. No. 1941), the Court should allow this discrete deposition questioning. See Horsewood, 1998 U.S. Dist. LEXIS 13108, at *23.

Topic 33 seeks binding testimony about the "damage, injury or harm to the IRW, if any, that is specifically attributable to the improper poultry litter / poultry waste disposal practices of the Cargill Defendants or their contract growers." (Dkt. No. 1933-4 at 7.) Again, the State bases its argument on the prior Peterson topics 5 and 6 that sought general information about complaints that IRW waters had been contaminated by poultry waste and about "ecological or environmental impacts" resulting from such complaints or from violations of state law. (Dkt. No. 1933-6 at 9.) The Cargill Defendants are entitled to pin the State down on the basis for its pleaded allegations that natural resource damages are attributable to the Cargill Defendants. Since the State refuses to fully answer written discovery on this subject (see Dkt. No. 1941) and even admits that it has produced only "[d]amage reports generally, but not specific to Cargill Defendants" (Dkt. No. 1933-14 at 9), the Court should allow the Cargill Defendants to conduct this narrow and important questioning. See Horsewood, 1998 U.S. Dist. LEXIS 13108, at *23.

In sum, Plaintiffs have offered no grounds for the Court to conclude that the vast majority of the Cargill Defendants' 30(b)(6) topics are duplicative of prior 30(b)(6) depositions, and inadequate grounds for four more. The Court should reject Plaintiffs' argument as to topics 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 32, 33, 34, 35, 36, and 37, and should order that the deposition go forward on those topics.

B. As the State has Refused to Fully Answer Written Discovery on Cargill-Specific Topics, the 30(b)(6) Notices Cannot Be Duplicative.

Plaintiffs also contend that some of the Cargill Defendants' noticed 30(b)(6) topics are duplicative of written discovery. As discussed at length in the Cargill Defendants' pending motion to compel, Plaintiffs have failed to provide sufficient responses to most of the requests

served by the Cargill Defendants in February 2009,[2] and are deficient in providing necessary supplementation to Cargill, Inc.'s Amended First Set of Interrogatory Nos. 1-17 and CTP's Amended First Set of Interrogatory Nos. 3, 5-9, 11-18. (Dkt. No. 1941.) Despite the Cargill Defendants' repeated attempts to confer with Plaintiffs on the deficiencies in these particular Cargill-specific discovery requests, Plaintiffs use these same disputed requests to show purported duplication of Cargill-specific discovery in support of their motion for protective order.

Plaintiffs' Exhibit 11 uses their deficient responses to Cargill, Inc.'s Amended First Set of Interrogatory Nos. 1, 2, 3, 9, 10, 11, 12, 13, 14, 15, 16, 17 and CTP Nos. 3, 9, 11, 14, 16, 18 – all of which are and have been the subject of an ongoing supplementation dispute between the parties. (See Dkt. No. 1941 at 20-25.) In addition, despite having received a detailed deficiency letter on these very requests (Dkt. No. 1941-2), the State nonetheless contends that its inadequate responses to the Cargill Defendants' February 2009 Interrogatory Nos. 2, 3, and 4 are substantively duplicative of noticed Topics 15, 22, 25, and/or 26. (Dkt. No. 1933-14 at 4, 6-8.) *Every* deposition topic challenged by reference to a Cargill Defendant's discovery request relies on Plaintiffs' responses to written discovery that the Cargill Defendants have concluded are deficient, responses that the State knew when it moved for protective order were the subject of an imminent motion to compel by the Cargill Defendants. (See Dkt. No. 1941 at 3-6, discussing meet and confer.) Plaintiffs' discovery arguments lack both factual support and candor, as Plaintiffs make no mention to the Court about the disputed nature of the very responses on which they rely.

In addition, Plaintiffs admit that no prior deposition notice and no discovery served by

---

[2] Specifically, the Cargill Defendants have moved to compel sufficient responses to their RFA Nos. 1, 5, 6, 7, 8, 9, 10, 11, 12 ,13, 14, 15, and 16; Interrogatory Nos. 1, 2, 3, and 4; and Requests

(continued on next page)

the Cargill Defendants is duplicative of noticed Topic 4, which seeks the names and addresses of all individuals who have or may sustain health conditions specifically caused by poultry litter or waste generated by the Cargill Defendants or their contract growers. (Dkt. No. 1933-14 at 2.) Plaintiffs claim that Topic 4 constitutes unreasonably cumulative or duplicative discovery solely because they "responded to [a] similar interrogatory from Simmons," an interrogatory Plaintiffs do not even identify. (Id.) The entity-specific information the Cargill Defendants seek cannot be duplicative of some unspecified Simmons interrogatory.

C. Plaintiffs' Generalized Expert Reports Provide No Cargill-Specific Information.

Plaintiffs' blanket claim that "many of the 30(b)(6) topics are subsumed within the State's non-damages expert reports" is not sustained by the facts. (Dkt. No. 1933 at 4.) Plaintiffs do not even attempt to support this assertion with specific page citations to their expert reports (id.), presumably because doing so would highlight how rarely any of those reports actually use the word "Cargill." In reality, Plaintiffs' experts' reports barely mention either of the Cargill Defendants, and in no way provide a substitute for any of the noticed 30(b)(6) topics. Of the 16 non-damages reports that Plaintiffs produced, only six mention Cargill in any way.

The substance of Plaintiff's experts' reports likewise do little or nothing to address the proposed 30(b)(6) topics as they relate to the Cargill Defendants. Some experts mention Cargill only in passing. For example, Robert Lawrence concluded that the disposal of poultry litter creates a significant public health risk for both IRW residents visitors who recreate on and in IRW waters, but his only mention of Cargill was to note that Tom Hayes of Cargill served on the Pew Commission on Industrial Farm Animal Production for 18 months. (Ex. C: Lawrence

---

(continued from previous page)

for Production Nos. 1, 4, 5, 6, 8, and 9, all served on February 17, 2009. (Dkt. No. 1941.)

Report at 5.) Some experts offer more substance but fail to address how Cargill's or CTP's actions resulted in the alleged violations or to what degree the Cargill Defendants contributed to the alleged harm. For example, Berton Fisher analyzed poultry waste generation, disposal, and transportation of land-applied poultry litter and provided a history of Cargill operations in the IRW. (Ex. D: Fisher Report at 11-13, 18.) But that history does not cover the 30(b)(6) topics noticed by the Cargill Defendants. Similarly, Dr. Fisher's statement that "[t]he feed formulations used by … Cargill … demonstrate that the Defendant's [*sic*] design and control the composition of feed provided to their poultry" (id. at 35) does not explain how the Cargill Defendants' design and control of feed composition *has caused harm*, the point of noticed Topics 31 and 32. (See Dkt. No. 1933-4 at 7.)

Plaintiffs' experts' depositions provided no more specific information. For example, in one instance the expert did not even review documents produced by the Cargill Defendants before forming his opinions about the Cargill Defendants. (Ex. E: 1/15/08 Engel Dep. at 275:16 – 276:7.) Another expert testified that although he knew that the Cargill Defendants produced only turkeys, he could not distinguish between a turkey sample as opposed to a chicken sample in his analysis. (Ex. F: 2/2/08 Olsen Dep. at 336:20 – 339:26.) The experts demonstrate an inability to tie their testimony to the Cargill Defendants in a meaningful way.

Notably, in Plaintiffs' own chart at Exhibit 11, in reference to Topic 34 regarding costs incurred by the State to remediate damage, injury, or harm to the IRW specifically attributable to the Cargill Defendants, Plaintiffs note in highlight that they have produced only "[d]amage reports generally, but not specific to Cargill Defendants." (Dkt. No. 1933-14 at 9.)[3] Plaintiffs

[3] Plaintiffs' chart specifies that they have no other argument regarding the duplicative nature of Topic 34. (Dkt. No. 1933-14 at 9.)

cannot fairly contend that their industry-focused expert reports are in any way duplicative of the Cargill-specific discovery sought here.

In sum, Plaintiffs have not shown that any of the Cargill Defendants' 30(b)(6) topics are actually duplicative of prior depositions of the State, of written discovery, or of expert productions. Plaintiffs thus have failed to meet their heavy burden to show that a protective order is warranted.

D. The Cargill Defendants Are Entitled to Take a Limited, Non-Duplicative Entity-Specific 30(b)(6) Deposition.

Plaintiffs provide this Court with no case law analogous to the situation at hand. First, Plaintiffs' reliance on Cummings v. GMC is not well taken. (See Dkt. No. 1933 at 7.) In Cummings, the court struck the plaintiffs' attempts to serve 30(b)(6) notices on categories of employees of the defendant because the Rule allows an entity to chose its designees. 2002 U.S. Dist. LEXIS 27627, at *15-16 (W.D. Okla. June 18, 2002). In so ruling, the court explained that the defendant had already submitted to a 30(b)(6) deposition noticed by the plaintiffs on the same topic. Id. That situation bears little resemblance to the circumstances here, where the Cargill Defendants served procedurally correct deposition notices for topics on which the State has not yet been forced – or has repeatedly refused – to stake a position. (See, e.g., Dkt. No. 1941.)

Plaintiffs also rely on the District of Colorado's Vail Corp. decision for their extraordinary request to prevent a 30(b)(6) deposition. Here, unlike the situation in Vail Corp., the Cargill Defendants do not seek duplicative testimony – they seek to force the State's designees to answer questions that the State has thus far refused to put to rest. See 2008 WL 5104811, at *2-3. As noted above, even under the extreme circumstances of that case, the court

nonetheless permitted a 30(b)(6) deposition to proceed.[4] Id.

In addition, this Court should hesitate to preclude this noticed 30(b)(6) testimony inasmuch as Magistrate Judge Joyner has already held in this case that a dispute over the scope of testimony anticipated at a 30(b)(6) deposition is "not technically ripe for determination" if it "precedes the actual deposition." (Oct. 24, 2007 Ord. at 6, n.10.)

Finally, the Court should reject Plaintiffs' footnoted request that the Court limit any 30(b)(6) deposition of the State to seven hours regardless the number of designees. (Dkt. No. 1933 at 7, n.3.) Plaintiffs provide literally no reason for this Court to impose this arbitrary time limit. (See id.) The request is contrary to the protocol that the parties have followed in this case, in which the party noticing the deposition has been the master of its length (within reason, of course). To cite the most compelling example here, Plaintiffs requested and spent four full days deposing the two 30(b)(6) designees for the Cargill Defendants. (Ex. G: Maupin & Alsup Dep. Trs.)

E. Plaintiffs Have Not Shown Good Cause for Their Drastic Protective Order.

The decision to enter a protective order is within this Court's discretion. Fed. R. Civ. P. 26(c); Thomas v. Int'l Bus. Machs., 48 F.3d 478, 482 (10th Cir. 1995), and the party seeking a protective order has the burden to demonstrate good cause. E.g., Sentry Ins. v. Shivers, 164 F.R.D. 255, 256 (D. Kan. 1996). To establish such good cause, Plaintiffs "must submit 'a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.'" Horsewood, 1998 U.S. Dist. LEXIS 13108, at *7 (quoting Gulf Oil v. Bernard,

[4] Plaintiffs' argument that the Cargill Defendants' notice seeks to invade counsel's work product is a non sequitor. (See Dkt. No. 1933 at 8.) The Cargill Defendants have not and are not asking to see the documents selected by counsel to prepare a deponent – the Cargill Defendants are just seeking a 30(b)(6) deposition in the first instance.

452 U.S. 89, 102 n.16 (1981)).

Plaintiffs' motion for protective order fails to offer any particular or specific demonstration of facts showing an undue burden or other unfair prejudice that would result from going forward with the Cargill Defendants' 30(b)(6) depositions. Plaintiffs' blanket, unsupported assertions that discovery is "overly broad, inefficient and unreasonable, and thus unduly burdensome" (Dkt. No. 1933 at 7) cannot suffice as an objection in the normal course, and provide no real support for a motion for protective order. E.g., Gheesling v. Chater, 162 F.R.D. 649, 650 (D. Kan. 1995); In re Urethane Antitrust Litig., 237 F.R.D. 454, 454 (D. Kan. 2006); Metzger v. Am. Fid. Assur. Co., 2006 U.S. Dist. LEXIS 79956, at *25-26 (W. D. Okla. Oct. 31, 2006).

Instead of demonstrating any actual good cause, Plaintiffs resort to hyperbole and *ad hominem* comments, asserting that the Cargill Defendants are acting in concert with the other Defendants to engage "in a deposition blitzkrieg of the State" (Dkt. No. 1933 at 5), and that the Cargill Defendants' deposition notice "is nothing but an improper effort to harass the State with duplicative, burdensome discovery." (Id. at 8.) Plaintiffs offer no evidence to support these bald assertions. Without such a factual showing, Plaintiffs have failed to meet the burden of proving good cause for denying the Cargill Defendants the right to notice and conduct their 30(b)(6) deposition of the State. See Horsewood, 1998 U.S. Dist. LEXIS 13108, at *7

CONCLUSION

The Cargill Defendants are entitled to binding testimony by the State regarding its evidence against Cargill, Inc. and against Cargill Turkey Production, LLC. Because the Cargill Defendants' 30(b)(6) deposition notice is narrowly tailored to elicit only Cargill-specific information, it is not duplicative, overbroad, or unduly burdensome. It is, however, a key means

for the Cargill Defendants to finally secure entity-specific discovery from Plaintiffs. The Cargill Defendants urge the Court to deny Plaintiffs' motion and direct that the deposition go forward.

Respectfully submitted,

Rhodes, Hieronymus, Jones, Tucker & Gable, PLLC

BY: /s/ John H. Tucker
JOHN H. TUCKER, OBA #9110
COLIN H. TUCKER, OBA #16325
THERESA NOBLE HILL, OBA #19119
100 W. Fifth Street, Suite 400 (74103-4287)
P.O. Box 21100
Tulsa, Oklahoma 74121-1100
Telephone: 918/582-1173
Facsimile: 918/592-3390

And

DELMAR R. EHRICH
BRUCE JONES
KRISANN C. KLEIBACKER LEE
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402
Telephone: 612/766-7000
Facsimile: 612/766-1600
ATTORNEYS FOR CARGILL, INC. AND CARGILL TURKEY PRODUCTION LLC

CERTIFICATE OF SERVICE

I certify that on the 30th day of March, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General	drew_edmondson@oag.state.ok.us
Kelly Hunter Burch, Assistant Attorney General	kelly_burch@oag.state.ok.us
J. Trevor Hammons, Assistant Attorney General	trevor_hammons@oag.state.ok.us
Daniel Lennington, Assistant Attorney General	Daniel.lennington@oag.ok.gov
Melvin David Riggs	driggs@riggsabney.com
Joseph P. Lennart	jlennart@riggsabney.com
Richard T. Garren	rgarren@riggsabney.com
Sharon K. Weaver	sweaver@riggsabney.com
Robert Allen Nance	rnance@riggsabney.com
Dorothy Sharon Gentry	sgentry@riggsabney.com
David P. Page	dpage@riggsabney.com
Riggs Abney Neal Turpen Orbison & Lewis, P.C.	
Louis W. Bullock	lbullock@mkblaw.net
J. Randall Miller	rmiller@mkblaw.net
Miller Keffer & Bullock Pedigo LLC	
William H. Narwold	bnarwold@motleyrice.com
Elizabeth C. Ward	lward@motleyrice.com
Frederick C. Baker	fbaker@motleyrice.com
Lee M. Heath	lheath@motleyrice.com
Elizabeth Claire Xidis	cxidis@motleyrice.com
Fidelma L Fitzpatrick	ffitzpatrick@motelyrice.com
Motley Rice LLC	
COUNSEL FOR PLAINTIFFS	
Stephen L. Jantzen	sjantzen@ryanwhaley.com
Paula M. Buchwald	pbuchwald@ryanwhaley.com
Patrick Michael Ryan	pryan@ryanwhaley.com
Ryan, Whaley & Coldiron, P.C.	
Mark D. Hopson	mhopson@sidley.com
Jay Thomas Jorgensen	jjorgensen@sidley.com
Timothy K. Webster	twebster@sidley.com
Gordon D. Todd	gtodd@sidley.com
Sidley Austin LLP	
L Bryan Burns	bryan.burs@tyson.com
Robert W. George	robert.george@tyson.com

Michael R. Bond — michael.bond@kutakrock.com
Erin W. Thompson — erin.thompson@kutakrock.com
Dustin R. Darst — dustin.dartst@kutakrock.com
Kutack Rock LLP
COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.; AND COBB-VANTRESS, INC.

R. Thomas Lay — rtl@kiralaw.com
Kerr, Irvine, Rhodes & Ables

Jennifer S. Griffin — jgriffin@lathropgage.com
Lathrop & Gage, L.C.
COUNSEL FOR WILLOW BROOK FOODS, INC.

Robert P. Redemann — rredemann@pmrlaw.net
Lawrence W. Zeringue — lzeringue@pmrlaw.net
David C .Senger — dsenger@pmrlaw.net
Perrine, McGivern, Redemann, Reid, Berry & Taylor, PLLC

Robert E. Sanders — rsanders@youngwilliams.com
E. Stephen Williams — steve.williams@youngwilliams.com
Young Williams P.A.
COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.

George W. Owens — gwo@owenslawfirmpc.com
Randall E. Rose — rer@owenslawfirmpc.com
The Owens Law Firm, P.C.

James M. Graves — jgraves@bassettlawfirm.com
Gary V. Weeks — gweeks@bassettlawfirm.com
Woody Bassett — wbassett@bassettlawfirm.com
K.C.Dupps Tucker — kctucker@bassettlawfirm.com
Bassett Law Firm
COUNSEL FOR GEORGE'S INC. AND GEORGE'S FARMS, INC.

John R. Elrod — jelrod@cwlaw.com
Vicki Bronson — vbronson@cwlaw.com
Bruce W. Freeman — bfreeman@cwlaw.com
P. Joshua Wisley — jwisley@cwlaw.com
Conner & Winters, LLLP
COUNSEL FOR SIMMONS FOODS, INC.

A. Scott McDaniel — smcdaniel@mhla-law.com
Nicole M. Longwell — nlongwell@mhla-law.com
Philip D. Hixon — phixon@mhla-law.com
Craig Mirkes — cmirkes@mhla-law.com
McDaniel, Hixon, Longwell & Acord, PLLC

Sherry P. Bartley — sbartley@mwsgw.com
Mitchell Williams Selig Gates & Woodyard
COUNSEL FOR PETERSON FARMS, INC.

Michael D. Graves mgraves@hallestill.com
Dale Kenyon Williams, Jr. kwilliams@hallestill.com
COUNSEL FOR CERTAIN POULTRY GROWERS

I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

Thomas C. Green
Sidley Austin Brown & Wood LLP
1501 K Street NW
Washington, DC 20005
COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.; AND COBB-VANTRESS, INC.

s/ John H. Tucker